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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-288

ROBERT N. PRATT,
Petitioner

vs.

THE STATE OF ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, Robert N. Pratt, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Alabama rendered on March 20, 1973, which judgment affirmed the conviction of Robert N. Pratt in the Circuit Court of Jefferson County, Alabama, for the crime of practicing law without a license.

A timely Application for Rehearing in the Alabama Court of Criminal Appeals was denied without opinion on April 17, 1973.

A timely Application for Writ of Certiorari was filed in the Supreme Court of Alabama and was denied, without opinion, on May 24, 1973.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals has been reported at 278 So. 2d 724, cert. den. 278 So. 2d 729, and appears in the Appendix hereto.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on March 20, 1973, and appears in the Appendix hereto. A timely Application for Rehearing was denied on April 17, 1973.

A Petition for Writ of Certiorari, timely filed in the Supreme Court of Alabama, was denied on May 24, 1973, and the order thereon appears in the Appendix.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Alabama Court of Criminal Appeals is 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner Pratt denied his XIV Amendment rights when the State of Alabama failed to elect under which Alabama statute it prosecuted him?
2. Was Petitioner Pratt denied equal protection of the law under Amendment XIV where the trial court denied him sufficient time to rebut the testimony of a State's witness after a presumption of an illegal verdict was raised?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Annotated, Title 28:

§1257 (3) State courts; appeal, certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * *

(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . the United States.

Code of Alabama, 1940 (Recomp. 1958), Title 46, § 31:

§ 31. UNLAWFUL PRACTICE OF LAW. – If any person shall, without having become duly licensed to practice, or whose license to practice shall have expired either by disbarment, failure to pay his license fee within thirty days after the day it becomes due, or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer, he shall be guilty of a misdemeanor and fined not to exceed five hundred dollars, or be imprisoned for a period not to exceed six months, or both.

Code of Alabama, 1940 (Recomp. 1958), Title 46, §42:

§42. WHO MAY PRACTICE AS ATTORNEYS. – Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: Whoever, (a) in a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a justice of the peace, or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or (b) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or, (c) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or, (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between

persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law. Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands; nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property, however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or corporation in support of its title policies, to be retained in its files and not to be recorded. Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this article to be an act of practicing law, is guilty of a misdemeanor, and on conviction must be punished as provided by law. And any person, firm or corporation who conspires with, aids and abets, another person, firm or corporation in the commission of such misdemeanor must, on conviction, be punished as provided by law.

STATEMENT OF THE CASE

The prosecution in this case commenced upon a district attorney's complaint charging the Petitioner with unlawfully engaging in the practice of law after previously surrendering his license to practice law and further alleging that on September 15, 1969, the Petitioner met with one Sherry Morris in Jefferson County, Alabama, and did agree to obtain for the Morris' a divorce in consideration of the payment of $160.00 to himself. The complaint further alleged

that several months later Mrs. Morris received a divorce decree in the mail.

The sufficiency of the complaint was attacked by Petitioner's demurrer on the grounds of vagueness, uncertainty and duplicity due to failure to sufficiently allege a violation of either Section 31 or Section 42 of Title 46, *Code of Alabama*. The demurrers were overruled and at the commencement of trial, Petitioner moved to require the State of Alabama to elect whether it proceeded under the provisions of Section 31 or Section 42. Petitioner's motion was overruled by the Court.

The trial commenced with a stipulation that the Petitioner had voluntarily surrendered his license to practice law in 1964.

The State's case was based largely upon the testimony of Sherry Morris who identified a business card bearing the name Robert N. Pratt and the title "Attorney at Law", and a receipt signed by Petitioner acknowledging receipt of $160.00 on September 15, 1969. Both exhibits were admitted into evidence.

The witness stated that she first met Petitioner in September, 1969, and that he advised Mr. and Mrs. Morris to reconcile their differences in lieu of obtaining a divorce. The witness stated that she later called Petitioner, met him at a shopping center in Jefferson County, Alabama, and gave him $160.00 for which he gave her a receipt. The witness stated that she later met Petitioner at a parking lot and signed some papers for him. Then, at a later date, she testified she received a decree of divorce in the mail which showed a return address of "Pratt's Radiator Shop".

On cross-examination the witness testified that there was never any conversation between herself and Petitioner as to whether he was or was not a lawyer. Upon further examination the witness testified that she had sworn certain facts to be true as part of the divorce, but that all of the said facts were not true. Upon objection by the State, the witness was not allowed to answer as to whether the marriage of her ex-husband to Petitioner's niece had created feelings of ill will toward Petitioner in her mind.

The State's next witness, Jeanell Hambley, the sister of Mrs. Morris, merely corroborated the testimony of Mrs. Morris as to a previous meeting with Petitioner. The next witness for the State was David Hambley, the husband of the previous witness, whose testimony was virtually identical to that of his wife. Thereafter, the State rested.

Petitioner then moved for a directed verdict, to exclude the State's evidence, and to compel the State to make an election as to whether it was proceeding under the provisions of Section 31 or Section 42 of Title 46 of the *Code of Alabama*. These motions were overruled by the trial court.

The first witness for the Petitioner was Peter Morris, the former husband of Sherry Morris who had testified previously on behalf of the State of Alabama. He testified that the first conversation he had with Petitioner with reference to a divorce was when he asked if Petitioner knew a lawyer who could get a divorce for him. He then testified that the attorney who represented him in the actual divorce proceedings was Roy Williams, not the Petitioner Robert Pratt.

On cross-examination Mr. Morris testified that he had never seen the aforesaid Roy Williams and that he had signed the papers for a divorce in the presence of Petitioner's mother at the Pratt Radiator Shop. He further testified that since the divorce he had remarried and that his wife was related to the Petitioner.

Petitioner then took the stand in his own defense to testify that he had first been contacted by Peter Morris in August or September of 1969 concerning certain marital difficulty. He stated that he later received a call from Peter Morris who asked if he and his wife could come over to talk to Petitioner about a divorce. Petitioner testified that he told them he could not get a divorce for them but that he would be glad to talk with them about their problems and that he could refer them to Roy Williams who would handle a divorce for them if that is what they wanted.

Petitioner then testified that two weeks later he received a phone call from Peter Morris who said that he and his wife wanted to talk with him once again. He testified that on this occasion Mr. and Mrs. Morris brought Mr. and

Mrs. Hambley with them, and that they all sat down together while the Morris' discussed their marital problems. Petitioner testified that he made some notes on this occasion and told the Morris' that he would make arrangements for Mr. Williams to handle the divorce for them. He further testified that the notes he made on that occasion were turned over to Mr. Williams and that Mr. Williams, not himself, had drawn up and prepared all the papers which were used in connection with the divorce.

Robert Pratt further testified that the papers which had been prepared by Mr. Williams were delivered to the Pratt Radiator Shop and that Peter Morris signed the papers there. He further testified that, at a later date, he met Mrs. Morris at a shopping center where she brought some money for the divorce and signed the papers.

Petitioner then testified that he took all of the papers and the money and delivered them to Mr. Williams at his office the next day. He then identified Roy Williams' signature on the divorce as being authentic.

On cross-examination the Petitioner testified that in early 1970 the Morris' advised him that they were desirous of obtaining a divorce and that he related this information to Mr. Williams, an attorney. He testified that shortly thereafter he received two copies of the final decree of divorce from Mr. Williams and that he thereupon called the Morris' who requested that the decree be mailed to them.

The next witness for the defense was the Circuit Judge who had rendered the decree dated February 5, 1970. He testified that Roy Williams, a practicing attorney, had presented the decree to him for signature.

The State then called an officer of the Birmingham Bar Association in rebuttal, who testified regarding a certain statement given to him under oath by Peter Morris. The statement was then introduced into evidence and the State rested its case in rebuttal.

The Petitioner then renewed his motion for a directed verdict as well as his motion to compel the State to make an election, both motions being overruled by the trial court.

After oral argument the Petitioner objected to that portion of the Court's oral charge to the jury as it related to the Court reading the provisions of two Code sections and on the grounds that the oral charge, in its entirety, permitted the jury to convict if it found the Petitioner had violated either of the Code provisions read, without regard to whether such conduct was alleged in the district attorney's complaint.

The jury returned a verdict of guilty and assessed the Petitioner's fine at $400.00.

Shortly thereafter one of the attorneys for Petitioner identified a paper as having been found in the jury room after the jury concluded its deliberations. The paper, indicating an apparent quotient verdict, was introduced into evidence.

The State then called one of the jurors who testified that the writing on the paper was his but that there was no prior agreement to be bound by the quotient obtained. Thereupon Petitioner moved to continue the hearing until such time as would permit his counsel to interview and call as witnesses other jurors who had heard the case. This motion for a continuance, as well as a motion for new trial, were overruled by the Court.

REASONS FOR GRANTING THE WRIT

I.

WAS PETITIONER PRATT DENIED HIS XIV AMENDMENT RIGHTS WHEN THE STATE OF ALABAMA FAILED TO ELECT UNDER WHICH ALABAMA STATUTE IT PROSECUTED HIM?

The district attorney's complaint upon which this prosecution was brought charged that Petitioner unlawfully engaged in the practice of law after having previously surrendered his license in that on a given date he did meet Sherry Morris at a certain place in Jefferson County, Alabama, and did then and there agree to obtain for her and her husband a divorce in consideration of payment to himself of $160.00. The complaint further alleged that shortly after

February 5, 1970, Sherry Morris received a divorce decree, the words of which were set forth in the complaint in its entirety.

Two sections of Title 46 of the *Code of Alabama* are pertinent to the offense charged: Section 31 provides that any person whose license shall have expired either by disbarment or otherwise and who thereafter practices or assumes to act or holds himself out to the public as a person qualified to practice or carry on the calling of a lawyer shall be guilty of a misdemeanor; and Section 42 sets forth in detail certain acts constituting "practicing law" and further provides that any person doing any such act is guilty of a misdemeanor.

Appellant's demurrer at the initial stages of the trial questioned the sufficiency of the complaint to state an offense under either of the aforementioned sections of the *Code of Alabama*. Construing the complaint most strongly against the pleader, as is the Alabama rule, it alleges no more than that the Appellant obtained from Sherry Morris $160.00 as consideration for his agreement to obtain for her and her husband a divorce. There is nothing in this complaint which would constitute an offense under Title 46, Section 31 of the *Code of Alabama*. The allegations of the complaint fail to allege sufficient facts to bring the conduct charged within any of the four subsections of Title 46, Section 42 of the *Code of Alabama*.

This complaint must withstand attack on its particular allegations and not on the general allegation that the accused "did unlawfully engage in the practice of law." Statutes creating crimes are to be strictly construed in favor of the accused and may not be held to extend to cases not covered by the words used. *United States v. Resnick*, 299 U.S. 207, 57 S. Ct. 126, 81 L. Ed. 127 (1936). No accused can be punished for a violation of a criminal statute unless his case is plainly and unmistakably within its terms. *United States v. Lacher*, 134 U.S. 624, 10 S. Ct. 625, 33 L. Ed. 1080 (1899).

The complaint on which this prosecution is based falls somewhere between two sections of the *Code of Ala-*

bama, and not specifically upon either code section. The State of Alabama made no election as to which section it was proceeding under so the complaint violates the constitutional guarantee of due process in failing to apprise the Petitioner of exactly what he must defend against. Criminal or penal statutes must be strictly construed. *United States v. Reese*, 92 U.S. 214, 23 L. Ed. 563 (1875); *France v. United States*, 164 U.S. 676, 17 S. Ct. 219, 41 L. Ed. 595 (1896).

When a general term is used in a statute creating or defining an offense and it is followed by terms more specific or precise, an indictment or information using only the general term is insufficient. *Horton v. State*, 53 Ala. 488, (1875); *State v. Plunkett*, 2 Stew. 11 (Ala. 1832). The indictment must stand on the particular conduct alleged as constituting the offense charged and here the district attorney's complaint charges no conduct proscribed by any statute pertinent to this cause. Therefore, the specific allegations contained in the complaint fail to charge an offense. See *Mitchell v. State*, 41 Al. App. 254, 130 So. 2d 198 (1961). In the operation of a penal statute, all reasonable doubt as to the offense charged ought to operate in favor of the defendant. *Ex Parte Webb*, 225 U.S. 663, 32 S. Ct. 769, 56 L. Ed. 1248 (1911).

II

WAS PETITIONER PRATT DENIED EQUAL PROTECTION OF THE LAW UNDER AMENDMENT XIV WHERE THE TRIAL COURT DENIED HIM SUFFICIENT TIME TO REBUT THE TESTIMONY OF A STATE'S WITNESS AFTER A PRESUMPTION OF AN ILLEGAL VERDICT WAS RAISED?

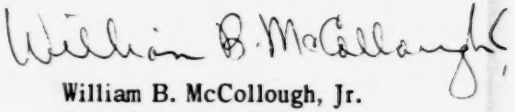
At the conclusion of the trial a piece of paper was retrieved from the jury room which raised the reasonable presumption that the verdict was a gambling or quotient verdict. *International Agri. Corp. v. Abercrombie*, 184 Ala. 244, 63 So. 549 (1913). It is the law of Alabama that testimony of the jurors is available to rebut or deny the presumption of an illegal verdict. *George's Restaurant v. Dukes*, 216 Ala. 239, 113 So. 53 (1927).

There was no doubt that the presumption of an illegal verdict was raised here, as is noted in the opinion of the Alabama Court of Criminal Appeals. However, only the State was allowed to present evidence and thereby sustain the verdict. Petitioner moved the Court to allow him time to interview various members of the jury in order to sustain the presumption of an illegal verdict. However, the trial court, as well as the Court of Criminal Appeals, summarily dismissed Petitioner's request on the grounds that such a matter was within the "sound discretion" of the trial court. In doing so, the courts have denied Petitioner his constitutional right to equal protection of the law. If the State is allowed to produce testimony to rebut a presumption of the illegality of a verdict, the same right must extend to the defendant or he is denied equality with the State before the bar of justice. Every procedure which fails to maintain an equal balance between the state and the accused denies the latter due process of law. *Re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). The trial court has surely abused its discretion in failing to allow Petitioner time in which to produce evidence to sustain the presumption of an illegal verdict.

CONCLUSION

To protect the fundamental constitutional rights of the Petitioner, a writ of certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal Appeals.

Respectfully submitted,



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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, William B. McCollough, Jr., attorney for Robert N. Pratt, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9 day of August, 1973, I served three copies of the foregoing Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals on the State of Alabama as follows:

By mailing in the United States Mail three copies of same in a duly addressed envelope with first class postage prepaid to the Honorable William J. Baxley, Attorney General of the State of Alabama, Office of the Attorney General, State of Alabama Administrative Building, Montgomery, Alabama 36104.

William B. McCollough, Jr.

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